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No.

In the Supreme Court of the United States

PHILIP MORRIS INCORPORATED, ET AL.,
PETITIONERS

v.

HOWARD A. ENGLE, M.D., ET AL.,
RESPONDENTS

Petition for a Writ of Certiorari to the Florida District Court of Appeal for the Third District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is consistent with the requirements of the Due Process Clause for a class action lawsuit to be tried before a judge who is a member of the certified class.

RULE 14.1(b) AND 29.6 STATEMENT

Pursuant to Supreme Court Rule 14.1(b), petitioner states that, in addition to Philip Morris Incorporated, petitioners here, and in the court below, include Lorillard Tobacco Company, Lorillard, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Council for Tobacco Research-U.S.A., Inc., and Tobacco Institute, Inc. In addition to Howard A. Engle, M.D., respondents here, and in the court below, include Robert W. Angell, Raymond Lacey, Frosene Steevens, Frank Amodeo, Mary Farnan, Angie Della Vecchia, Loren Lowery, and Michael Matyi, on behalf of themselves and all others similarly situated; Liggett Group, Inc.; and Brooke Group Ltd., Inc.

Pursuant to Supreme Court Rule 29.6, petitioners submit the following corporate information:

Petitioner Philip Morris Incorporated has the following parent corporation: Philip Morris Companies Inc. Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Petitioner R.J. Reynolds Tobacco Company has the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.). R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Petitioner Brown & Williamson Tobacco Corporation (individually and as successor by merger to The American Tobacco Company) has the following parent corporations: B.A.T. Industries, p.l.c.; BATIC Inc.; BATUS Holdings Inc. UK/US; BATUS Tobacco Services, Inc.; British American Tobacco p.l.c.; British American Tobacco (1998) Limited; British-American Tobacco (Holdings) Ltd.; and Louisville Securities Ltd. British American Tobacco p.l.c. is the only

publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Petitioner Lorillard Tobacco Company has the following parent corporations: Lorillard, Inc.; and Loews Corporation. Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Petitioner The Council for Tobacco Research-U.S.A., Inc. ("CTR") has no parent corporations. There are no publicly held companies that own 10% or more of CTR's stock.

Petitioner The Tobacco Institute, Inc. ("TI") has no parent corporations. There are no publicly held companies that own 10% or more of TI's stock.

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Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising From Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987) 19, 20

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OPINIONS BELOW

The decision of the Florida District Court of Appeal denying the petition for a writ of prohibition (App., *infra*, 1a) is unreported. The decision of the trial court denying petitioners' motion to disqualify (App., *infra*, 2a) is unreported.

JURISDICTION

The Florida District Court of Appeal denied petitioners' petition for a writ of prohibition on August 18, 1999. App., *infra*, 1a. A motion for rehearing and/or certification to the Florida Supreme Court was denied on November 19, 1999. App., *infra*, 2a. Because the District Court of Appeal denied the petition without opinion and did not certify a question to the Florida Supreme Court, the Florida Supreme Court has no jurisdiction to review the denial. See FLA. CONST. art. V, § 3; *Jenkins* v. *Florida*, 385 So.2d 1356, 1359 (Fla. 1980). Accordingly, for purposes of 28 U.S.C. § 1257, the District Court of Appeal is the highest court of Florida in which a decision could be had. See, *e.g.*, *Palmore* v. *Sidoti*, 466 U.S. 429, 430 (1984); *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967); see also FLA. R. APP. P. 9.030(a).

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257. Petitioners have no right under Florida law to litigate the federal issue presented here in any subsequent appeal. See *Nordqvist* v. *Nordqvist*, 586 So.2d 1282, 1283 (Fla. Dist. Ct. App. 1991); *Obanion* v. *Florida*, 496 So.2d 977, 980 (Fla. Dist. Ct. App. 1986), rev. denied, 504 So.2d 768 (Fla. 1987). Thus, this is a case "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975). Moreover, because in Florida a petition for prohibition is an original action (see FLA. CONST. art. V,

§ 4(b)(3); FLA. R. APP. P. 9.030(b)(3), 9.100), the District Court of Appeal's denial of the petition is a final judgment for purposes of this Court's jurisdiction under Section 1257. See *Fisher* v. *District Court*, 424 U.S. 382, 385 n.7 (1976); *Board of Educ.* v. *Superior Court*, 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers); R. STERN ET AL., SUPREME COURT PRACTICE 108 (7th ed. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of Sections 38.02, 38.04, and 38.10, Florida Statutes, Florida Rule of Judicial Administration 2.160, and Florida Code of Judicial Conduct Canon 3E(1), are set forth at App., *infra*, 5a-9a.

STATEMENT

Petitioners find themselves defending a high-stakes, hard-fought class action lawsuit before a judge who is a member of the certified plaintiff class. Petitioners sought relief in the Florida courts, invoking the firmly established proposition that no person can be a judge in his own case, but the Florida courts rejected that ground for recusal as "legally insufficient." That ruling plainly violates the constitutional guarantee of due process and conflicts with the decisions of this Court, the federal courts of appeals, and the highest courts of numerous states. It also demonstrates that — perhaps even more than "hard cases" — cases that should be easy but that involve unpopular defendants all too often make bad law. Because this is an important case, presenting a fundamental question of constitutional law affecting hundreds of thousands of people, this Court should grant certiorari. Indeed, because the decision below so blatantly conflicts with settled law, the Court may wish to consider summary reversal pursuant to Rule 16.1.

1. This is a class action brought on behalf of "[a]ll [Florida] citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *R.J. Reynolds Tobacco Co.* v. *Engle*, 672 So. 2d 39, 40 (Fla. Dist. Ct. App. 1996). It is the only smokers' lawsuit ever permitted by any court to go to trial as a class action.[1] Plaintiffs contend that petitioners should be held liable for cancer, heart disease, and other illnesses caused by smoking. Petitioners are vigorously defending against the suit on a variety of grounds. The stakes are immense: the class (which plaintiffs have estimated to include between 225,000 and 850,000 individuals) seeks compensatory and punitive damages in excess of $200 ***billion***.

The trial plan, adopted over petitioners' objections, divided the case into three separate phases. Phase I was designed to adjudicate issues purportedly common to all

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[1] Federal courts have unanimously rejected requests to certify such class actions by smokers, both on a nationwide and statewide basis, as a violation of Fed. R. Civ. P. 23, the federal Constitution, or both. See, *e.g.*, *Barnes* v. *America Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), cert. denied, 119 S. Ct. 1760 (1999); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Insolia* v. *Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998); *Emig* v. *American Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998); *Barreras Ruiz* v. *American Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Walker* v. *Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W. Va. 1997); *Smith* v. *Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997). Likewise, state courts in all but two other states have rejected attempts to certify smoker class actions. See, *e.g.*, *Taylor* v. *American Tobacco Co.*, No. 97-715975 NP (Mich. Circ. Ct. Jan. 10, 2000); *Avallone* v. *American Tobacco Co.*, No. MID-L-4883-98MT (N.J. Sup. Ct. Dec. 2, 1999); *Small* v. *Lorillard Tobacco Co.*, 698 N.Y.S.2d 615 (N.Y. 1999); *Fletcher* v. *Brooke Group, Ltd.*, No. CV 97-913 (Ala. Circ. Ct. July 22, 1999). Of the two exceptions, the propriety of one class certification (in Louisiana) has been cast into doubt by a subsequently-enacted statute, and the other is currently subject to review on mandamus before Maryland's highest court.

members of the class. One such issue was whether smoking is causally related to various illnesses and medical conditions. The jury found in Phase I that cigarette smoking causes angina and atherosclerosis — the conditions at issue in this petition.[2] Phase II, which is currently underway, is designed (1) to adjudicate the compensatory damages claims of three individual plaintiffs selected by class counsel, and (2) to award a single, "lump-sum" amount of punitive damages that ultimately will be divided evenly among what the judge has described as "the entire qualified class." Phase III, which could take decades to complete, will separately adjudicate the individual liability and compensatory damages claims of the remaining class members.

2. From the outset of this litigation, it was understood that former or present smokers suffering from any of the illnesses at issue in the case (and their family members) could not properly sit in judgment of petitioners.[3] Indeed, during the three-month process of jury selection, the trial judge, the

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[2] In Phase I, without hearing evidence particular to any class member, the jury also was permitted to find that petitioners engaged in conduct that, in the words of the verdict form, "would permit a potential award or entitlement to punitive damages" in an amount yet to be determined.

[3] Plaintiffs have always steadfastly maintained that the reference to "addiction" in the class definition has no effect on class membership because ***all*** smokers are "addicted" for purposes of this lawsuit. See, ***e.g.***, Engle Class Compilation, at 1-2, *R.J. Reynolds Tobacco Co.* v. ***Engle***, No. 942797 (Fla. Dist. Ct. App. Jan. 30, 1998) ("It was and continues to be the contention of the Engle Class that ***all smokers are addicted*** to cigarettes containing nicotine. That is not an individual issue." (emphasis added)). Moreover, in certifying the case as a class action the trial court expressly cited plaintiffs' contention that all smokers are "addicted." See Order Granting Motion for Class Certification, at 3, *R.J. Reynolds Tobacco Co.* v. ***Engle***, No. 94-08273 CA 22 (Fla. Circ. Ct. Oct. 31, 1994). Plaintiffs do not dispute that, at this juncture in the litigation, the class of plaintiffs includes any smoker or former smoker who is a Florida citizen or resident and suffers from a disease claimed by plaintiffs to be smoking-related.

Honorable Robert P. Kaye, disqualified hundreds of prospective jurors on the ground that they (or, where applicable, their family members) might be part of the plaintiff class. See, *e.g.*, Tr. 3540-3544, 4145-4146, 6050-6052, 7230-7236, 7465-7468, 8103-8107, 9599-9601. Despite relying upon such information to disqualify jurors for cause, Judge Kaye did not divulge that ***he*** had a similar profile, as a former smoker with a form of heart disease alleged by plaintiffs to be caused by smoking.

Following jury selection, and prior to the parties' discovery of his class membership, Judge Kaye presided over Phase I of the case. In those proceedings, the parties presented extensive evidence concerning whether and to what extent smoking is causally related to heart diseases such as angina and atherosclerosis. The trial of Phase I was replete with disputes concerning admissibility of evidence, propriety of lines of questioning, and scope of expert testimony. Judge Kaye adjudicated them all, usually in favor of the class. In addition, in rulings that petitioners contended (and continue to contend) constituted gross misapplications of state and federal law, Judge Kaye held that Florida's statute of repose did not apply because a higher court "might" find its application unconstitutional; that notwithstanding the *Noerr-Pennington* doctrine plaintiffs could introduce extensive evidence concerning defendants' lobbying activities and statements to Congress; and that evidence concerning the alleged inadequacy of post-1969 warnings about the dangers of smoking was admissible despite the preemption provisions of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334, see *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), because, in the judge's words, "pre-emption doesn't apply to modern science and what's happening today." Tr. 16621-16622. Judge Kaye's rulings established the framework for Phase I. At the end of those proceedings, the jury returned findings in favor of the class.

3. Shortly before the end of Phase I, Judge Kaye was suddenly hospitalized. The parties were informed that he had undergone an angioplasty to correct a blocked artery (atherosclerosis) and that, in fact, he had been suffering from a heart blockage for approximately ten years. See Motion to Disqualify, Exh. A, *R.J. Reynolds Tobacco Co.* v. *Engle*, No. 94-08273 CA 22 (Fla. Circ. Ct. Aug. 2, 1999). This was the first time petitioners learned of the trial judge's medical problems. Not long thereafter, petitioners discovered that Judge Kaye was a former smoker, and therefore a member of the plaintiff class. *Ibid.* Judge Kaye had never revealed either his smoking history or his medical condition to the parties, despite clear judicial canons requiring disqualification of a judge with a financial interest in a case and mandating disclosure of information that might relate to such interest. See ABA CODE OF JUDICIAL CONDUCT Canon 3C; FLA. CODE OF JUDICIAL CONDUCT Canon 3E(1).

4. Promptly upon learning of Judge Kaye's membership in the plaintiff class, petitioners moved for his recusal, invoking the relevant provisions of Florida law and the Due Process Clause of the Fourteenth Amendment. Florida law expressly requires a judge who denies a disqualification motion to enter an order declaring himself qualified and to file a sworn statement that the grounds for the motion are untrue. See FLA. STAT. §§ 38.02, 38.04. Judge Kaye did not do so. Instead, a mere two days after the recusal motion was filed, Judge Kaye summarily denied it as "legally insufficient." App., *infra*, 2a. Under Florida law, that denial constituted an acknowledgment that the factual basis for the recusal motion was accurate,[4] leaving only the legal question whether a judge

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[4] See, *e.g.*, *Hooks* v. *Florida*, 207 So. 2d 459, 464-465 (Fla. Dist. Ct. App. 1968) ("[W]here the judge, upon the suggestion being filed in the language of [Fla. Stat. § 38.02], summarily denies it as having 'no foundation in law,' without even according a hearing to the litigant or his lawyer, he in legal effect concedes the suggestion regardless of how he

may preside over a class action when he is a member of the plaintiff class.

Petitioners then sought a writ of prohibition in the Florida District Court of Appeal for the Third District. They argued that Judge Kaye's membership in the plaintiff class was legally sufficient to mandate his disqualification, under both state law and the federal constitution's guarantee of due process. The petition was denied without comment on August 18, 1999. App., *infra*, 1a. Petitioners' motion for rehearing, rehearing en banc, or certification to the Supreme Court of Florida was denied on November 19, 1999. *Id.* at 3a-4a.

5. Neither the Florida courts nor plaintiffs have disputed that Judge Kaye's history of smoking and heart disease places him within the plaintiff class. Nonetheless, Judge Kaye continues to sit as the trial judge in this ongoing litigation, and to issue what are (and what are bound to be perceived as) crucial rulings in favor of the plaintiff class. For example, for months Judge Kaye had indicated that punitive damages would need to be determined individually. Following his hospitalization, plaintiffs asked Judge Kaye to reconsider that ruling and instead to allow the jury to return a single, potentially massive, lump-sum punitive award, which would be divided evenly among the successful members of the certified class. Petitioners strenuously opposed that suggestion, pointing out, among other things, that a lump-sum award in Phase II, prior to the adjudication of individual compensatory damages in Phase III, would not permit satisfaction of the legal requirement that punitive damages bear a reasonable relationship to actual harm. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 580-82 (1996). Despite this problem, Judge Kaye granted plaintiffs' motion and changed the trial plan to provide for a lump-sum punitive award.

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otherwise characterizes it.").

Thus, in Phase II as presently structured, Judge Kaye has (over petitioners' objections) permitted the trial of individual claims, starting with three persons hand-picked by class counsel, and apparently continuing until the jury reaches a verdict that petitioners are liable to at least one plaintiff. The jury will then be directed to determine, in one lump sum, a class-wide award of punitive damages.

REASONS FOR GRANTING THE PETITION

For all involved, the stakes in this landmark case — the first smokers' class action ever permitted to go to trial — are enormous. For the tobacco companies (threatened with potentially ruinous liability), the hundreds of thousands of class members (who stand to share in any damages awards), and the courts of Florida (which under the trial plan would adjudicate Phase III claims for decades), what happens in this trial will have profound ramifications. But perhaps the most serious impact of this closely watched case will be upon the public's perception of the fairness of our judicial system.

It is wholly inconsistent with the most fundamental notions of fairness to have this precedent-setting, multi-billion dollar case tried by a judge who will be eligible to receive a substantial recovery himself if the plaintiffs prevail. In allowing Judge Kaye to preside over the case despite his membership in the certified class, the Florida courts have bent the constitutional constraints imposed by the Due Process Clause beyond recognition.

No proposition is more firmly established than that due process requires a neutral decisionmaker with no financial interest in the outcome of a case. This rule has been interpreted by every court to have addressed the issue — until now — to bar a judge from presiding over a lawsuit to which he is a party and in which he stands to gain a substantial monetary recovery if the action is successful. This Court has long taken a special interest in enforcing that principle, which is essential to public confidence in the judicial system. In cases

such as *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), *Chicago Teachers Union, Local No. 1* v. *Hudson*, 475 U.S. 293 (1986), *Connally* v. *Georgia*, 429 U.S. 245 (1977), *Withrow* v. *Larkin*, 421 U.S. 35 (1975), *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), *In re Murchison*, 349 U.S. 133 (1955), and *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the Court has granted review to make clear, in a broad range of contexts, the fundamental nature of the right to impartial adjudication.

The Court should do so once again here. Whether injured smokers should be permitted to recover damages from tobacco companies, and, if so, under what circumstances and to what extent, are critical issues of public policy. If they are to be decided in the courts, it is essential to adhere to basic rules designed to ensure absolute fairness. Nonetheless, the Florida courts have held that the trial judge's class membership is "legally insufficient" to require his recusal in this class action. Florida law will not permit petitioners to litigate that issue in any subsequent appeal. See page 1, *supra*. To maintain public faith in the legal system, uniformity of decisions, and the interests of justice, this Court should grant review.

I. THE DECISION BELOW BLATANTLY VIOLATES THIS COURT'S HOLDINGS THAT DUE PROCESS MANDATES DISQUALIFICATION OF A JUDGE WITH A SUBSTANTIAL FINANCIAL INTEREST IN THE OUTCOME OF THE PROCEEDINGS

This Court has repeatedly held that due process prohibits trials by judges with financial interests in the cases before them. That principle applies to class actions as it does to individual lawsuits. The decision below squarely conflicts with those holdings.

A "'fair trial in a fair tribunal,' * * * before a judge with no actual bias against the defendant or interest in the outcome of his particular case," is a cornerstone of due process. *Bracy*

v. *Gramley*, 520 U.S. 899, 904-905 (1997) (quoting *Withrow*, 421 U.S. at 46). Accordingly, as this Court has recognized repeatedly over the past seven decades, a judge's pecuniary interest in the outcome of a case disqualifies him under the Due Process Clause. *Aetna*, 475 U.S. at 824; *Hudson*, 475 U.S. at 307-308; *Connally*, 429 U.S. at 250; *Withrow*, 421 U.S. at 47; *Gibson*, 411 U.S. at 579; *Ward*, 409 U.S. at 60-61; *Murchison*, 349 U.S. at 136; *Tumey*, 273 U.S. at 523.

The decision in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), makes clear that the financial interest possessed by Judge Kaye mandates his disqualification under the Due Process Clause. In *Aetna*, this Court reviewed the refusal of a justice of the Alabama Supreme Court to disqualify himself from an appeal involving the questions whether Alabama law permitted an intentional tort claim of bad faith in first-party insurance actions and, if so, whether a successful plaintiff in such a case could be awarded punitive damages. *Id.* at 816, 822. At the time he cast the deciding vote to recognize the claim and authored the opinion for the majority, the challenged justice was a plaintiff in a pending putative class action involving similar legal theories. *Id.* at 822-823. Shortly after issuance of the Alabama Supreme Court's opinion, the justice received a $30,000 settlement. *Id.* at 824.

This Court held in *Aetna* that the justice's participation in the appeal violated due process by making him "'a judge in his own case.'" 475 U.S. at 824 (quoting *Murchison*, 349 U.S. at 136). The justice's opinion for the Alabama Supreme Court "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." *Aetna*, 475 U.S. at 824. This financial interest was sufficiently "direct, personal, [and] substantial" to mandate

disqualification. *Ibid.* (citation and internal quotation marks omitted).[5]

Here the trial judge is a plaintiff not in a ***similar*** case, but in ***the very case before him***. The due process violation could not be more egregious. We know from the record that Judge Kaye would not have been permitted to sit as a juror, had his personal situation been revealed; yet he is presiding over this case as a judge. Put another way, every time plaintiffs' counsel makes an argument to Judge Kaye, he is requesting a favorable ruling from one of his clients. A more flagrant conflict of interest could hardly be imagined.

Judge Kaye's financial interest in the case is certainly "direct, personal, [and] substantial." *Aetna,* 475 U.S. at 824 (citation and internal quotation marks omitted). As a former smoker with heart disease, Judge Kaye will be eligible to seek not only compensatory damages for his heart condition but his share of any lump sum punitive damages award that may be returned in Phase II of the case. If the class succeeds in obtaining the full amount it seeks (and every ruling by Judge

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[5] In contrast, the *Aetna* Court noted, any pecuniary interest the remaining justices of the Alabama Supreme Court might have, by virtue of their status as potential class members in the disqualified justice's pending lawsuit, was too "speculative and contingent" to require recusal. 475 U.S. at 825-826. As the Court explained, the justices were not even aware of the pending action before issuance of their decision; at the time of denial of the motion for rehearing, "the trial court had not even certified a class, let alone awarded any class relief of a pecuniary nature." *Id.* at 826. This Court's emphasis on the lack of a certified class is mirrored in the holdings of lower courts, which have distinguished between judges who are members of a certified class, who are disqualified from hearing the action, and judges who are potential members of classes that have not yet been certified, who are not. See pages 16-18, *infra*. But see L. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 50 (1986) ("As long as the possibility exists that a class will be certified, a judge who may be a class member should not preside in even the preliminary matters of the case."). Here the class has been certified.

Kaye in plaintiffs' favor increases the likelihood of that outcome), the recovery will be upwards of $200 billion — or more than ***$200,000*** per person even if the class includes 850,000 members and every one prevails on his or her claim. But whatever the precise number, the sum of money that Judge Kaye stands to receive if plaintiffs prevail undeniably "offer[s] a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true." *Tumey*, 273 U.S. at 532.

To be sure, for Judge Kaye as for any other class member, recovery on an individual claim is uncertain. That, however, hardly eliminates the disqualifying interest. Indeed, this Court has made clear that the due process ban on interested decisionmakers applies even in cases where the financial interest in the outcome of litigation is far more attenuated than it is here. In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), for example, the Court held that license revocation hearings before the state Board of Optometry violated due process, because a decision to revoke licenses of optometrists employed by business corporations would reduce by nearly half the number of optometrists in competition with members of the Board, which was made up solely of optometrists in private practice. *Id.* at 578-579. As the Court explained, this reduction of competition, and the likelihood of personal financial gain that might result, created a sufficient "financial stake" to render the Board members unconstitutionally interested. *Id.* at 579.

And in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), the Court held that an indirect financial stake, even with no possibility of personal financial gain, mandated disqualification. The challenged judge in *Ward* was the mayor of a village with "executive responsibilities for village finances." *Id.* at 60. Fines, forfeitures, costs, and fees imposed by the mayor for ordinance violations and traffic offenses were paid into the municipal treasury. *Id.* at 58 & n.1. The Court held that this indirect financial interest was

sufficient to create a "'possible temptation'" of "partisan" decisionmaking, in order "to maintain the high level of contribution from the mayor's court." *Id.* at 60 (quoting *Tumey*, 273 U.S. at 532); see also *Connally*, 429 U.S. at 250 (due process violated where magistrate received fee for issuing, but not denying, search warrant, because of possible temptation created by financial interest).

Nor does the fact that Judge Kaye's financial interest stems from his status as a member of a certified class alter the constitutional calculus. The due process guarantee of an impartial decisionmaker applies with full force to class actions, despite the difficulties that sometimes arise in ascertaining whether a judge has a disqualifying financial interest. In *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Court acknowledged that large class actions often have "hundreds or even thousands" of class members. *Id.* at 862 n.9. Furthermore, "the fact that the precise contours of the class are often not defined until well into the litigation" may mean that a judge is not aware of a disqualifying interest until a relatively late stage of the proceedings. *Ibid.* Nonetheless, the Court explained, judges have "a duty to stay informed of any personal or fiduciary financial interest they may have in cases over which they preside" — and to disqualify themselves when such an interest is discovered — in order to satisfy the statutory and constitutional requirements of an impartial tribunal. *Ibid.*; see also *id.* at 865 n.12 (noting "constitutional dimensions" of disqualification for interest).[6]

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[6] Although a judge's minimal and attenuated interest in some class actions might not be sufficient for disqualification under the Due Process Clause, cf. *In re Cement Antitrust Litig.*, 688 F.2d 1297 (9th Cir. 1982), aff'd mem. sub nom. *Arizona* v. *United States Dist. Ct.*, 459 U.S. 1191 (1983), there can be no doubt that this case involves a direct financial interest of potentially substantial magnitude. Whatever the outer limits of disqualification in the context of a class action, this case is well within them.

Strict enforcement of the disqualification requirement is particularly appropriate in a case like this, where the contours of the likely plaintiff class were known at an early stage of the proceedings. During voir dire, each prospective juror was asked whether he or any family member was a current or former smoker and, if so, whether he or the family member suffered from any of the diseases or medical conditions that plaintiffs alleged to be caused by smoking. Judge Kaye disqualified numerous potential jurors who answered these questions in the affirmative, on the grounds of their actual or potential membership in the class. Judge Kaye knew from the onset of the trial (although the defendants did not) that he was a former smoker. After months of evidence on the links between smoking and various illnesses, he was hospitalized ***as the result of a disease that the plaintiffs' case specifically associates with smoking***. No defendant — let alone a defendant faced with massive and potentially ruinous damages liability — should in fairness be forced to proceed under such circumstances.[7]

"[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment," such as a financial stake as a member of a certified class in the outcome of the class action proceedings, the Court will "presume that the process was impaired" and vacate the judge's rulings. *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986) (plurality opinion). This Court recognized in *Murchison* that this

> stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."

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[7] Financial interest aside, the fact that Judge Kaye only recently has had a very personal, life-altering experience that goes to the essence of this very case by itself suggests that impartiality, and its appearance, are impossible.

349 U.S. at 136 (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)); see also, *e.g.*, *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974); *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971); *Levine* v. *United States*, 362 U.S. 610, 616 (1960); *Public Utils. Comm'n* v. *Pollak*, 343 U.S. 452, 467 (1952) (Frankfurter, J.). That is eminently so here.

Petitioners have been denied the central guarantor of due process: an impartial judge. Because of the fundamental "[i]mportance of the federal constitutional question[]" raised by bias or interest on the part of a decisionmaker (*Murchison*, 349 U.S. at 136), this Court has frequently granted review to safeguard the due process requirement of judicial impartiality. See, *e.g.*, *Aetna*, 475 U.S. 813; *Taylor*, 418 U.S. 488; *Gibson*, 411 U.S. 564; *Ward*, 409 U.S. 57. Given the blatant nature of the due process violation here, and the enormous practical importance of this litigation, review unquestionably is appropriate.

II. THE DECISION BELOW CONFLICTS WITH SETTLED AUTHORITY FROM STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS

The decision below stands in sharp contrast to the widespread judicial recognition, embodied in rulings of numerous state and federal courts, that a trial judge may not preside over a class action when he is a member of the certified class and has a substantial financial interest in the outcome of litigation.[8]

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[8] Disqualification standards for federal judges are codified at Sections 144 and 455, 28 U.S.C., and the Code of Conduct for United States Judges; in state court, disqualification is governed by state statutes and judicial and professional rules, including Canon 3C of the ABA Code of Judicial Conduct. Although the decisions discussed in this section were based on state and federal law rather than the Due Process Clause directly, they nonetheless reflect constitutional requirements. See, *e.g.*, H.R. REP. 93-1453, at 7, *reprinted in* 1974 U.S.C.C.A.N. 6351, 6356 (noting that 28 U.S.C. § 455 is intended to codify "the proposition that the judge's direct

State supreme courts have consistently agreed that a judge's pecuniary interest in a case stemming from his status as a class member mandates disqualification. In *Madsen* v. *Prudential Federal Savings & Loan Ass'n*, 767 P.2d 538 (Utah 1988), for example, the plaintiffs sought damages for a class of Prudential borrowers; the trial judge was a former borrower. *Id.* at 539-540. Although the Utah Supreme Court found that the motion to disqualify was untimely, it nonetheless went on to determine whether, in light of "the importance of impartiality," the trial judge should have recused himself *sua sponte*. *Id.* at 544. The court held that potential class membership was not grounds for disqualification, but that the trial judge "would have to disqualify himself from further proceedings" if "any existing certified classes are expanded to include [the trial judge] or any new class were certified that included him." *Id.* at 549.

Similarly, in *Pierce* v. *New Mexico*, 910 P.2d 288 (N.M. 1995), the New Mexico Supreme Court reviewed the dismissal of a class action brought on behalf of retirees receiving a state pension. As the court explained, the "remote pecuniary interest" of its justices arising from their status as state employees participating in the state pension system would normally require disqualification. *Id.* at 293. The California Supreme Court reached the same conclusion in *Olson* v. *Cory*, 636 P.2d 532 (Cal. 1980), assuming that its members' financial interest in a class action brought on behalf of all state judges to challenge limits on judicial salary increases

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economic or financial interest, even though relatively small, in the outcome of the case may well be inconsistent with due process"). This Court noted in *Bracy* that although "most questions concerning a judge's qualifications to hear a case are * * * answered by common law, statute, or the professional standards of the bench and bar," the Due Process Clause "establishes a constitutional floor" of a judge with no "interest in the outcome" of the case being adjudicated. 520 U.S. at 904-905.

would disqualify them from considering the appeal. *Id.* at 535.[9]

Federal courts of appeals have likewise concluded that a pecuniary interest as a class member disqualifies a judge from presiding over the class action. Thus, the Fifth Circuit has deemed it "fairly obvious that where a judge * * * is a member of a class seeking monetary relief," the judge's "financial interest in the case" would require disqualification. *Tramonte* v. *Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998); see also *In re City of Houston*, 745 F.2d 925, 928 n.6 (5th Cir. 1984) (judge who is class member in action seeking pecuniary relief is disqualified as interested party) (dictum); *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 719 F.2d 733, 734-735 (5th Cir. 1983) (judges who are class members in certified class seeking monetary relief are disqualified, but judges are not required to disqualify themselves if a class has yet to be certified); *Duplantier* v. *United States*, 606 F.2d 654, 662 (5th Cir. 1979) (judges who are class members normally are required to disqualify themselves, although participation may be permitted under rule of necessity).

The D.C. Circuit has distinguished between class actions that do not seek monetary recovery for individual class members and class actions seeking individual damages. *Christiansen* v. *National Sav. & Trust. Co.*, 683 F.2d 520, 526 (D.C. Cir. 1982). Although the *Christiansen* court held that class-member judges are not disqualified from presiding over the former type of cases, it suggested strongly that they were disqualified in the latter. *Ibid.*; see also *Tramonte*, 136

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[9] In *Pierce* and *Olson*, the courts held that the common law rule of necessity — which permits adjudication by interested judges if judicial review would not otherwise be possible, see *United States* v. *Will*, 449 U.S. 200, 211-217 (1980) — permitted the justices to adjudicate the matter despite their financial stake in the cases' outcomes. *Pierce*, 910 P.2d at 293; *Olson*, 636 P.2d at 535. That rule has no application here.

F.3d at 1029 (*Christiansen* "impl[ies] that judges should recuse themselves if they are members of a class for which individual recovery is sought").

III. THE DECISION BELOW IS PLAINLY WRONG

It is hardly surprising that the action of the Florida courts in this case, permitting a trial judge with a pecuniary interest as a class member to be the judge in his own case, conflicts with holdings of this Court and of every other state and federal court to have addressed the issue: it is patently untenable in light of basic constitutional principles.

First, and most important, allowing Judge Kaye to continue to preside cannot be reconciled with traditional notions of fairness. As this Court has emphasized "from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). Where a challenged procedure deviates from "common-law practice" and the "procedures applied by every other state," this Court has not hesitated to invalidate it. *Id.* at 435; see also, *e.g.*, *Connecticut* v. *Doehr*, 501 U.S. 1, 16-17 (1991) (striking down prejudgment attachment procedure "unknown at common law" and at odds with the procedures of "nearly every State"); *In re Oliver*, 333 U.S. 257, 267 (1948) (invalidating contempt conviction imposed on the basis of *in camera* proceedings where public criminal trial was "universal" practice of federal and state courts "during our nation's history" and had "its roots in our English common law heritage"). The rule against pecuniary interest — which has stood unchallenged for more than three centuries — has precisely the type of historical pedigree that establishes it as an essential element of the rule of law.

The English common law set forth a simple rule: because "no man shall be a judge in his own case," a judge was disqualified if he had a "direct pecuniary interest" in the case. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-610 (1947); see also *Tumey*, 273 U.S. at 524 (collecting

cases). Thus, as Sir Edward Coke explained, a lord could not set the amount of a fine to be paid for damages to his own property, nor could bailiffs levy a fine to be paid to one of them as a party.[10] E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 212 [141a] (T. Day ed., 1812); see also T. COVENTRY, A READABLE EDITION OF COKE UPON LITTLETON § 212 [141a] (1830). This principle was well-established in England by 1608. See Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising From Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 388 & nn. 32-34 (1987) (describing *Bonham's Case*, 8 Coke 107a, 77 638 (K.B. 1608)).

"The maxim that 'no man should be a judge in his own cause' was woven into the fabric of early American jurisprudence." Note, *Disqualification of Judges for Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 322 (1969). As one early constitutional commentator noted, the guarantee of due process mandated disqualification of a judge with an interest in the outcome of the case wherever the suit was "brought or defended in his interest" or "the property of a judge from its situation will be affected like complainant's by his ruling." T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 592 & n.3 (7th ed. 1903). Congress codified this principle in the first federal statute governing judicial disqualification, enacted in 1792, which required recusal by a district judge "concerned in interest" in a case. See Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278; see also *Liteky* v. *United States*, 510 U.S. 540,

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[10] As Justice Scalia explained in his concurring opinion in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the "American colonists were intimately familiar with Coke," and understood "due process of the law" to include Coke's understanding of the "the customary procedures to which freemen were entitled by the old law of England." *Id.* at 28-29 (citation and internal quotation marks omitted).

544-548 (1994) (citing successor statutes). By 1863, the New Hampshire Supreme Judicial Court could declare it to be "the immemorial practice of the courts" to treat as disqualified a judge with a financial interest in a case, even if "brought in another's name." *Moses* v. *Julian*, 45 N.H. 52, 53 (1863); see also, *e.g.*, Note, *Disqualification of Judges*, 48 OR. L. REV. at 314, 321-325. That principle has survived to the modern day. See Note, *Safeguarding the Litigant's Constitutional Right*, 86 MICH. L. REV. at 383 n.10, 386 n.25 (collecting statutes, state constitutional provisions, and professional codes requiring disqualification for interest).

In fact, in this very Court it has long been the practice for Justices to recuse themselves in cases in which they had any direct pecuniary interest, including an interest as a class member. Justice Livingston disqualified himself in *Livingston & Gilchrist* v. *Maryland Insurance Co.*, 11 U.S. (7 Cranch) 506, 506 (1813). Chief Justice Marshall disqualified himself in *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 603 (1813), and *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See IV A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 145-161 (1919). And in *United States* v. *Realty Co.*, 163 U.S. 427 (1896), Justice Edward White did not participate in a case challenging the constitutionality of federal bounties paid to sugar manufacturers and producers, brought on behalf of a class of manufacturers and producers. *Id.* at 444. As a recipient of a sugar bounty, Justice White was a member of the class on whose behalf the suit was brought. See R. HIGHSAW, EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH 50-51 (1981); Frank, *supra*, 56 YALE L.J. at 615 n.42.

Accordingly, the uniform rule of the common law, the state and federal courts, and this Court is to disqualify a judge with a direct pecuniary interest, including an interest as a class member, in the outcome of litigation. The Florida courts' casual conclusion that Judge Kaye's class membership somehow was "legally insufficient" to require his recusal

cannot be squared with this time-honored rule and the traditional understanding of the strictures of due process. See *Oberg*, 512 U.S. at 426-427; *Doehr*, 501 U.S. at 17; *Oliver*, 333 U.S. at 266-267.

The longstanding practice described above comports with the common-sense notion that it is unfair and unseemly to be tried by a decisionmaker with a substantial financial stake in the outcome. Both the American Bar Association's Code of Judicial Conduct and the Code of Conduct for United States Judges unequivocally bar judges from presiding over lawsuits in which they have a financial interest. See ABA CODE OF JUDICIAL CONDUCT Canon 3C; CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C. The Committee on the federal Code of Conduct has interpreted its disqualification rules to bar a judge who is a member of the class from presiding over a class action brought under Rule 23(b)(3). See Committee on Codes of Conduct, Advisory Opinion No. 90 ("Judges' Duty to Inquire When Relatives May Be Members of Class Action"); see also CODE OF CONDUCT FOR JUDGES Compendium § 3.1-6[4]. ABA Canon 3C has likewise been interpreted to bar a judge from adjudicating a class action lawsuit in which the judge is a class member and stands to receive a monetary reward if the suit is successful. See L. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 49-50 (1986).

Finally, commentators are unanimous in the view that a substantial financial stake as a member of a certified class should mandate disqualification of a judge from presiding over the class action. See, *e.g.*, Shaman & Fouts, *The Impact of Judicial Relationships on the Appearance of Impartiality*, 11 NO. 4 JUD. COND. RPTR. 1, 5 (Winter 1990); L. ABRAMSON, *supra*, at 50; Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45-46 (1970). Bluntly put, the commentators agree that "[a] judge who hears a case to which she is party has departed from the judicial ideal to such an extent that she can scarcely be considered a

judge at all." Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 285 (1987); see also Allison, *A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest*, 32 AM. BUS. L.J. 481, 514 (1995) ("[D]ecision-maker economic interests will always be among the worst kinds of biasing influence even if not the worst in every case.").

In short, there is no support whatsoever — state or federal, common law or statutory, regulatory or academic — for the position adopted by the lower courts in this case.

* * * * *

No principle of our judicial system is more fundamental or has a more established pedigree than the requirement of a neutral and disinterested decisionmaker. Indeed, even where a judge believes that his financial stake will not lead to actual bias, the interests underlying the Due Process Clause mandate disqualification. See Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N BAR OF CITY OF NEW YORK 694, 700 (Nov. 1973). As the Chief Justice has observed, a judge "cannot be certain that at least subconsciously he may not be pulled in one direction or another by the prospect of financial benefits on the one hand, or the fear of criticism that he may have acted in view of that prospect, on the other." *Ibid.* Furthermore, the public perception of fairness, and its confidence in the judicial system, "could be shaken by a decision by the judge in a case such as this in favor of his own financial interest." *Ibid.*

Both the reality and the perception of fairness are at stake in this case, and both have been undermined by the Florida courts' conclusion that Judge Kaye's class membership is "legally insufficient" to require his recusal. Given the Florida courts' refusal to rectify this egregious due process violation, this Court should do so.

CONCLUSION

The petition for a writ of certiorari should be granted. Because it is palpably clear that the lower courts have ignored the settled requirements of the Due Process Clause, summary reversal may be appropriate under Rule 16.1. See, *e.g.*, *Pounders* v. *Watson*, 521 U.S. 982 (1997); *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974); *Flower* v. *United States*, 407 U.S. 197 (1972); *Cruz* v. *Beto*, 405 U.S. 319 (1972).

Respectfully submitted.

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APPENDICES

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1999
AUGUST 18, 1999
CASE NO. 99-02080
LOWER TRIBUNAL NO. 94-8273

PHILIP MORRIS INCORPORATED, et al.,
Petitioner(s),

vs.

HOWARD A. ENGLE, M.D., et al.,
Respondent(s).

Following review of this petition for writ of prohibition, it is ordered that said petition is hereby denied. GERSTEN, SHEVIN and SORONDO, JJ., concur.

A True Copy
ATTEST:
MARY CAY BLANKS
Clerk District Court of
Appeal, Third District
By: /s/ Mary Cay Blanks
Deputy Clerk

cc: Robert C. Heim
Norman A. Coll
R. Benjamine Reid
Edward A. Moss
James T. Newsom
Jose E. Martinez
Hon. Robert P. Kaye
Melvin Spaeth
James A. Gould
Joseph P. Moodhe
Stephen N. Zack
Richard M. Kirby
Gordon A. Smith
Mark Hicks
Arthur J. England, Jr.
Stanley M. Rosenblatt
Kelly Anne Luther
Richard T. Woulfe
Michael Fay

APPENDIX B

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA 22 (KAYE)

HOWARD A. ENGLE, M.D., et al.,
Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO COMPANY, et al.,
Defendants

ORDER DENYING DEFENDANTS' MOTION TO DISQUALIFY

This cause having come on to be heard by the Court on Defendants Motion to Disqualify, and the Court Having considered the motion and attached affidavits, and being otherwise fully informed in the premises, it is:

Ordered and Adjudged that the Defendants Motion To Disqualify be and is hereby DENIED as being legally insufficient.

Done and Ordered in Chambers at Miami, Dade County Florida, this 4th Day of August, 1999.

/s/ Robert P. Kaye
ROBERT P. KAYE
CIRCUIT JUDGE

cc: ALL COUNSEL OF RECORD

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1999
NOVEMBER 19, 1999
CASE NO. 99-2080
LOWER TRIBUNAL NO. 94-8273

PHILIP MORRIS INCORPORATED, et al.,
Appellant(s)/Petitioner(s),

vs.

HOWARD A. ENGLE, M.D., et al.,
Appellee(s)/Respondent(s).

Petitioners' motion for leave to file a reply is granted and the reply filed on November 8, 1999 is accepted by the Court.

Upon consideration, petitioners' motion to supplement or for alternative relief is denied. GERSTEN, SHEVIN and SORONDO, JJ., concur.

Petitioners' second motion to supplement the record is denied.

Petitioners; motion for rehearing and/or certfication is hereby denied. GERSTEN, SHEVIN and SORONDO, JJ., concur. Petitioners' motion for rehearing en banc is denied.

A True Copy
ATTEST:
/s/ Mary Cay Blanks
Clerk District Court of
Appeal, Third District

cc:
Robert C. Heim
Edward A. Moss
Stanley M. Rosenblatt
R. Bejamine Reid

Norman A. Coll
Richard T. Woulfe
Jose E. Martinez
James A. Goold
Joseph P. Moodhe
Richard A. Schneider
Michael Fay
Aaron Marks
Mark Hicks
Hon. Robert P. Kaye
Stephen N. Zack
Anthony N. Upshaw
James T. Newsom
Melvin Spaeth
Kelly Anne Luther
Richard M. Kirby
Arthur J. England, Jr.
Dan K. Webb

APPENDIX D

FLA. STAT. 38.02. Suggestion of disqualification; grounds; proceedings on suggestion and effect

In any cause in any of the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to any attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within 30 days after the party filing the suggestion, or the party's attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion appear for the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his or her disqualification, and declaring from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the trust or falsity of such suggestion. If the judge finds that the suggestion is true, he or she shall forthwith enter an order reciting the ground of his or her disqualification and declaring himself or herself disqualified in the cause; if the judge find that the suggestion is false, he or she shall forthwith enter the order so reciting and declaring himself or herself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall

be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

FLA. STAT. 38.04. Sworn statement by judge holding himself or herself qualified

Whenever any judge shall enter an order under s. 38.02 declaring qualification to act in said cause, he or she shall contemporaneously therewith file therein a sworn statement that to the best of his or her knowledge and belief the ground or grounds of the disqualification named in the suggestion do not exist.

FLA. STAT. 38.10. Disqualification of judge for prejudice; application; affidavits; etc.

Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and hold that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their

respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

FLA. R. JUD. ADMIN. 2.160. Disqualification of Trial Judges.

(a) Application. This rules applies only to county and circuit judges in all matter in all divisions of court.

(b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.

(c) Motion. A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.

(d) Grounds. A motion to disqualify shall show:

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

(2) that the judge before whom the case is pending or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to the cause.

(e) Time. A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling. Any motion for disqualification made during a trial must be based on

facts discovered during the trial and may be stated on the record and shall also be filed in writing in compliance with subdivision (c). Such trial motions shall be ruled on immediately.

(f) Determination - Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on trust of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

(g) Determination - Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.

(h) Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order of disqualification, unless good cause is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

(i) Judge's Initiative. Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative.

FLA. CODE OF JUDICIAL CONDUCT Canon 3(E). Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should keep informed about the judge's personal fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.